FOR ARGUMENT

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Supreme Court, U.S.
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No. 99-1908

IN THE

Supreme Court of the United States

JAMES ALEXANDER, *et al.*,

Petitioners,

v.

MARTHA SANDOVAL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the discriminatory effects regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are enforceable by private litigants in actions for prospective injunctive relief?

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STATEMENT OF THE CASE

A. Factual and Procedural Background

"Like forty-eight other states and the District of Columbia, the State of Alabama has historically administered the written portion of its . . . driver's license examination in a multitude of foreign languages." Pet. App. 58a. From at least the 1970's until 1991, the Alabama Department of Public Safety "administered thousands of written examinations in at least fourteen languages." Pet. App. 58a-59a. It obtained translations "at no cost," added new languages when "demand was great enough," and never found that "non-English speakers posed a greater safety risk or had more accidents than other motorists." Pet. App. 59a; *see* Pet. App. 168-69a. Several thousand individuals a year obtained driver's licenses by taking the translated tests. Pet. App. 169a n.56. The Department encountered "no significant problems in administering the examination" in other languages. Pet. App. 59a; *see* Pet. App. 168a.

In July 1990, the Alabama legislature ratified Amendment 509 to the Alabama Constitution. Pet. App. 59a. The Amendment declares that "English is the official language of the state of Alabama" and requires state officials to take "all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Ala. Const. amend. 509. In December 1991, in response to Amendment 509, the Department adopted the policy at issue in this case, requiring that "all driver license examinations . . . be printed and administered in English." Pet. App. 169a (citation omitted). The "sole justification" for the English-only policy was the passage of Amendment 509 to the Alabama Constitution. Pet. App. 205a; *see* Pet. App. 169a.

Despite its adoption of this English-only rule, the Department continued to license a variety of drivers who could not read English. The Department accommodated the illiterate, for example, by reading the examination to them in English. Pet. App. 176a. The Department offered a sign language version of the examination to deaf illiterate applicants. Pet. App. 179a-80a. Even if applicants could not

read, speak, or understand a word of English, the Department allowed "new residents with a valid license from another state . . . to simply exchange their out-of-state license for an Alabama license" without taking a test of any kind. Pet. App. 180a-81a. And non-English reading or speaking foreigners were permitted to drive in Alabama if they had a valid license from a foreign country. Pet. App. 181a-84a. "By providing special accommodations to illiterate applicants, handicapped applicants, out-of-state drivers with valid licenses and even foreign nationals with valid licenses, Alabama single[d] out resident non-English speaking applicants by requiring them to take their examinations in English only, without the aid of interpreters or translation aids." Pet. App. 185a.

Approximately eight months after the Department adopted its English-only rule, the Department's General Counsel drafted for the Alabama Attorney General a proposed opinion regarding the new policy. Pet. App. 60a-61a, 174a. The Department's apparent purpose was "to protect its legal interests as opposed to instituting a genuine review of its Policy." Pet. App. 174a n.60. The opinion "acknowledged that the Department's English-Only Policy 'might be a violation of Title VI of the Civil Rights Act of 1964'," Pet. App. 61a, citing this Court's opinion in *Lau v. Nichols*, 414 U.S. 563 (1974), *see* J.A. at 29 n.1. But the draft opinion asserted that considerations of "safety and the integrity of the licensing process would support a requirement that driver license examinations be given in English." Pet. App. 173a (citation omitted). High ranking officials within the Attorney General's office criticized the proposed opinion, one noting that "Alabama utilizes 'international highway signs and shapes. Therefore safety is not such an issue . . . . Some accommodation needs to be made.' . . . Nevertheless, the Attorney General signed the Opinion." Pet. App. 61a; *see* Pet. App. 174a.

Martha Sandoval is a permanent U.S. resident who both cleans homes and works at a restaurant and store that she owns with her husband; she filed this class action lawsuit in 1996. J.A. 1; Pet. App. 191a-92a. Mrs. Sandoval came to this country from Mexico in 1987. Although Spanish is her native tongue, she speaks and understands some English —

she can understand Alabama road-signs[1] and English phrases like "stop" or "turn right." Pet. App. 191a. But she is not sufficiently fluent in English to pass the Department's English-language driver's test, which is written at the tenth grade level. Pet. App. 191a-93a; *see* Pl. Tr. Ex. 15 at 3.[2] In her complaint, Mrs. Sandoval alleged, inter alia, that the Department's new English-only policy had an unjustified discriminatory effect on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d-1, and its implementing regulations.

After a bench trial, the district ruled that the Department's English-only policy violates Title VI of the Civil Rights Act of 1964. Pet. App. 252a. First, the district court held that the Department was subject to Title VI and its implementing regulations because it "receives millions of dollars in federal funds every year" from the Departments of Transportation and Justice and has promised, as a condition of receiving the money, "to comply with federal non-discrimination statutes and regulations." Pet. App. 76a, 129a; *see* Pet. App. 142a.[3] Second, the district court ruled that the Department's English-only policy had a substantial

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1 "Alabama utilizes international traffic signals that enable comprehension with little or no understanding of the English language." Pet. App. 237a n.85.

2 The District Court concluded that immigrants like Mrs. Sandoval who come to the United States as adults have particular difficulty learning English to the level of proficiency required by such an examination, App. 187a-188a, and that the denial of driver's licenses to such immigrants actually "'retards the learning of English'" and "'jeopardizes the assimilation of limited and non-English speaking persons into the community'" by tending to cut them off from "'normal interactions with English speakers in the community at large.'" Pet. App. 240a, 246a (citations omitted).

3 Regulations issued by both the Transportation and Justice Departments prohibit recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color or national origin." 49 C.F.R. § 21.5(b)(2)(DOT); *accord* 28 C.F.R. § 42.104(b)(2)(DOJ)("individuals" rather than "persons"); *see* Pet. App. 77a-78a n.13 (citing regulations).

discriminatory effect on the basis of national origin. *See* Pet. App. 185a-204a.[4] Third, the district court found that the Department did not have a legitimate justification for its policy, concluding that the proffered explanations were both pretextual and baseless. Pet. App. 205a-46a.

The court of appeals affirmed, emphasizing that the Department did "not contest any of the district court's findings of fact - either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State." Pet. App. 49a. The court held that "Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination." Pet. App. 57a.

B. The Petitioners' Statement

In the court of appeals, the petitioners did not contest any of the district court's factual determinations. Pet. App. 49a. But in this Court, they have disputed two of those findings.

First, the petitioners now claim that Alabama's restrictive practices are generally utilized by other states; "[b]e it the privilege of obtaining a driver's license . . . [or other privileges of participating in government functions], the state . . . governments have conditioned these benefits on proficiency in a common language." Pet. Br. at 3. But the district court found that, to the contrary, forty-eight states and the District of Columbia in fact accommodate persons who do not read English, either by giving their examinations in foreign languages or by allowing applicants to use interpreters or translation aids. Pet. App. 58a, 167a n.52 (discussing

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[4] The district court did not rule that "language could be equated to national origin," as petitioners suggest. Pet. Br. at 14. Instead, the court recognized that the "correct analysis . . . is not whether language equals national origin, but whether the policy of the Department, (here the policy based on language) has an unjustified disparate impact on the basis of national origin." Pet. App. 157a. The court's finding of disparate impact was based on record evidence. Pet. App. 185a-204a.

uncontested survey evidence), 207a n.78.[5] Although petitioners in their brief include a lengthy appendix citing 799 state statutes, none of these provisions requires applicants to take a driver's license examination in English.[6]

Second, petitioners in this Court assert that safety and administrative concerns were, in fact, the motives behind the 1991 decision to adopt the Department's new English-only rule.[7] The district court made detailed findings to the contrary. The court emphasized that the passage of Amendment 509 was in fact the "sole justification" for the English-only rule and that the rule was not supported by "*any* evidence that non-English speakers were a higher safety risk or that non-English speakers compromised examination integrity." Pet. App. 61a (emphasis in original); 205a; *see* Pet. App. 208a-18a (safety rationale proffered at trial without evidentiary support and riddled with inconsistencies[8]); Pet.

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[5] The only state other than Alabama that did not do so at the time of trial— West Virginia - has since begun to offer foreign language versions of its driver's license examination. *See* Phillip Rawls, *Appeals Court Agrees Alabama Can't Have English-Only Test*, Associated Press, Dec. 1, 1999, *available in* LEXIS News Library.

[6] Five states require that license applicants be able to understand English road signs. Petr. Br. App. A-17, 21, 25, 27, 49. Of course Mrs. Sandoval, like many people who could not pass a test requiring tenth-grade level English, can do that. Pet. App. 191a, 193a; Pl. Tr. Ex. 15 at 6-7; Tr. 214-16.

[7] Pet. Br. at 6-7 (denying licenses to non-English speakers "had the virtue of advancing public safety"; use of translated examinations, "*it was . . . determined*, was difficult to administer"; the state "*found* it difficult to identify a principled way for offering examinations in some languages but not in others")(emphasis added).

[8] *E.g.*, Pet. App. 213a ("Defendants fail to address why their same safety concerns are not raised when it comes to Alabama's illiterate . . . population. No matter what language they speak, illiterates, by definition, cannot read. Therefore, illiterate English speakers, like *some* non-English speakers, cannot read road signs. In fact . . . a higher percentage of Alabama's driving-age population are illiterate than are non-English speaking.")(emphasis added). Alabama will give a driver's license to an English-speaking illiterate who cannot read road signs, but not to a literate Spanish-speaking applicant who can.

App. 218a-33a (rejecting justifications based on alleged administrative difficulties and concerns over examination integrity in light of, among other things, the Department's long history of successfully administering test in foreign languages). Petitioners assert that obtaining translations was "potentially expensive" (Pet. Br. 7); the district court found, to the contrary, that the Department had in fact been able to obtain translations "at no cost." Pet. App. 39a.

Petitioners suggest that their policy is consonant with the federal requirement that naturalized citizens be able to read English. (Pet. Br. at 3). But federal naturalization law requires English literacy only at the elementary school level,[9] not the tenth grade level required for the Alabama test, and exempts from even that requirement older immigrants who have lived in the country for many years. 8 U.S.C. § 1423(b)(2). Federal law permits immigrants who cannot read English at all to become permanent residents. There is, at the least, considerable tension between federal immigration and naturalization laws and the Alabama practice of denying driver's licenses to legal immigrants and naturalized citizens who are not fluent in English.

SUMMARY OF ARGUMENT

This Court has long recognized the existence of an implied cause of action to enforce Title VI. *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983); *see Cannon v. University of Chicago*, 441 U.S. 677 (1979)(Title IX). That cause of action has been characterized broadly by this Court, and has not been limited to claims involving a violation of section 601 alone.

Since *Guardians*, the Court has repeatedly considered and resolved on the merits regulation-based claims arising under Tile VI or under the similarly worded provisions of Title IX and section 504. *E.g.*, *Bazemore v. Friday*, 478 U.S. 385 (1986)(Title VI); *Alexander v. Choate*, 469 U.S. 287 (1985)(section 504); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999)(Title IX). For three decades, the

[9] 8 U.S.C. § 1423(a)(1); 8 C.F.R. § 312.1(c)(2).

lower courts, like this Court, have been adjudicating such regulation-based claims. *See* Appendices A and B. "This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon*, 441 U.S. at 706 n.41.

Where a cause of action exists to redress violations of a statute, this Court sensibly has assumed that regulations which implement that statute may also be enforced in that manner. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). That assumption is particularly appropriate where, as here, the regulations are an essential part of the statutory scheme.

The provisions of section 602 do not compel a contrary result. This Court has repeatedly rejected arguments that those provisions bar recognition of an implied cause of action or require some form of exhaustion. Those provisions, most of which expressly apply only to fund terminations, were adopted solely to constrain the use of agency power. This Court has already recognized that Congress did not intend those limitations to apply to private actions. *Cannon*, 441 U.S. at 712 n.49.

Anomalous results would follow if private plaintiffs could enforce only section 601, but not the Title VI regulations. A plaintiff who alleged a violation of both section 601 and the regulations would have to divide his or her claims, bringing suit to enforce section 601 while complaining to a federal agency about the violation of the regulations. Federal courts would utilize different legal standards depending on whether a civil action was brought by the United States, which could enforce the regulation, or by a private plaintiff, who could not. Because 601 itself embodies a constitutional standard, this distinction would require the federal courts to reach constitutional questions in order to decide a claim that could otherwise be determined on the basis of the regulation. *Cf. Ashwander v. TVA*, 297 U.S. 288, 347 (1936).

The decisions of this Court neither compel nor support a requirement that Spending Clause legislation state explicitly that recipients can be sued by private parties for violations of funding conditions. Any such requirement would be inconsistent with this Court's prior decisions that there is an

implied cause of action under both Title VI and Title IX. The contention advanced by petitioners does not provide a basis for distinguishing between a private cause of action to enforce section 601 and a private cause of action to enforce the Title VI regulations. That contention, rather, is an argument that, if accepted, would require the Court to overrule *Guardians* and *Cannon*.

ARGUMENT

I. THE QUESTION PRESENTED IS LIMITED TO WHETHER AN IMPLIED CAUSE OF ACTION EXISTS TO ENFORCE THE TITLE VI DISPARATE IMPACT REGULATIONS

For almost four decades, statutes forbidding discrimination in federally assisted programs or activities have been a mainstay of national civil rights policy. The first such statute, Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. Title IX of the Education Act Amendments of 1972 forbids discrimination on the basis of sex in any education program or activity receiving federal assistance. 20 U.S.C. § 1681. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any federally assisted project. 29 U.S.C. § 794. The substantive terms of these statutes, as well as their provisions mandating implementing regulations, are essentially identical.

Since *Cannon v. University of Chicago*, 441 U.S. 677 (1979), it has been clear that an implied cause of action exists under these statutes for victims of unlawful discrimination. The question presented by the instant case stems from the fact that under Title VI (as is true of Title IX and section 504), the obligations imposed on recipients of federal funds derive from two interrelated provisions of the statute. First, section 601 provides in general language:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Second, section 602 directs federal agencies to issue "rules, regulations, or orders of general applicability" to "effectuate" section 601. 42 U.S.C. § 2000d-1. As mandated by Title VI, numerous agencies, including in this case the Departments of Justice and Transportation, have issued such regulations. In terms significantly more specific than section 601 itself, these Title VI implementing regulations spell out, inter alia, what types of practices are forbidden and require certain prophylactic steps designed to prevent the occurrence of the prohibited practices. *See* 28 C.F.R. §§ 42.101-42.415.

The decisions of this Court leave no doubt that the obligations imposed by section 601 can be enforced in a private action. The sole question now before the Court is whether the legal obligations imposed on federal funding recipients by the Title VI regulations can also be enforced by private litigants.

In their brief, however, petitioners present detailed arguments that address other issues. They contend at length that the Title VI regulations at issue are invalid (Pet. Br. at 5, 26-27, 30-32, 45). They insist that the regulations do not ever (or could not validly) apply to English-only practices (*id.* at 5, 9, 37, 41-42), and that, in any event, the regulations were not properly applied in the instant case. (*Id.* at 3).

None of these issues is properly before the Court. The Question Presented in the petition for certiorari was limited to the availability of an implied cause of action under the Title VI regulations. The petition itself addressed only the propriety of review by this Court of that specific issue. The petition expressly noted that the validity of the Title VI regulations applied in this case had been upheld by a majority of this Court in *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983). (Pet. at 15).

Rule 24.1(a) of this Court provides that the brief for petitioners "may not raise additional questions or change the substance of the questions already presented." Petitioners do

not contend that any of the additional issues addressed in their brief are within the scope of the Question Presented; clearly they are not. In this instance, there is little chance the Court would have granted review of any of the additional issues; in the court of appeals, for example, petitioners did not challenge the validity of the Title VI discriminatory effects regulations. Circumvention of Rule 24.1(a) would undermine the Court's ability to control at the certiorari stage the issues it will hear and would deny respondents the opportunity to address the certworthiness of a question. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992)(construing Rule 14.1(a)). "The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

The legal questions raised in a wide variety of different contexts by English-only requirements are complex and fact-specific. The number of amicus briefs that have been filed in this case addressing those issues amply attests to the considerable controversy provoked by these disputes. But the merits of these issues are not before the Court in the instant case. The question presented here is the narrow one of whether the obligations imposed by the Title VI regulations—whatever they may be—can be enforced through a private cause of action.

II. THE DECISIONS OF THIS COURT SUPPORT AN IMPLIED CAUSE OF ACTION TO ENFORCE THE TITLE VI DISCRIMINATORY EFFECTS REGULATIONS

A. An Implied Cause of Action Exists under Title VI

The existence of an implied cause of action under Title VI was definitively resolved by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983).

The specific issue before this Court in *Cannon* was whether an implied cause of action exists under Title IX. As the Court noted, the language of Title IX was taken virtually verbatim from the earlier provisions of Title VI. 441 U.S. at 695. In holding that Title IX provides for a private right of action, the Court repeatedly emphasized the similarities between Title VI and Title IX,[10] and relied heavily on the terms and legislative history of Title VI.[11] *See also National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 (1999)("in *Cannon* . . . we concluded that Congress had intended to authorize a private right of action even though it failed to do so expressly").

Four years later in *Guardians*, six members of the Court agreed that a cause of action indeed exists under Title VI itself. Justice White, joined by then-Justice Rehnquist, concluded that the availability of a cause of action under Title VI was controlled by *Cannon*. He noted that four members of the Court had earlier concluded in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), that such a cause of action existed under Title VI. *Guardians*, 463 U.S. at 594.[12] That plurality became a majority in *Cannon*. Justice White explained:

> A major part of the [Court's] analysis [in *Cannon*] was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. . . . Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI.

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[10] 441 U.S. at 694, 704, 708 n.42, 709.

[11] 441 U.S. 685-86 n.6, 687 n.8, 693-94 n.14, 699, 700-01 and nn.27-30, 702 and n.33, 705 n.38, 707 n.41, 711-16 and nn.48-52.

[12] *See Bakke*, 438 U.S. at 419-421, 420 n. 28 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, J.J.).

Id. at 594. Justice Stevens, joined by Justices Brennan and Blackmun, likewise insisted in a separate opinion "that Title VI, as well as the comparable provisions of Title IX . . . , may be enforced in a private action against recipients of federal funds." *Id.* at 635. Finally, Justice Marshall maintained "that a court has broad discretion to remedy violations of Title VI in actions brought by private parties," *id.* at 634, explaining that such relief "constitutes a 'necessary supplement' to the administrative enforcement mechanism contained in Title VI." *Id.* at 626. Since *Cannon* and *Guardians*, the availability of an implied cause of action under Title VI and its analogues has remained unquestioned.[13]

The characterization in *Guardians* and *Cannon* of the cause of action recognized by those decisions is not limited to the enforcement of the obligations and rights in section 601. Rather, those decisions describe the cause of action in broad terms as arising "under Title VI"[14] and as being available to "enforce Title VI."[15] *Cannon* also characterizes Title VI and Title IX as creating "a private right of action for the victims of illegal discrimination," 441 U.S. at 703; nothing in that phrasing suggests the illegality would be limited to violations of section 601, as opposed to violations of Title VI regulations which have the force of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Because the plaintiffs in

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[13] *See Lane v. Pena*, 518 U.S. 187, 196 (1996); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 & n.7 (1984).

[14] *Guardians*, 463 U.S. at 593, 594; *see id.* at 608 (Powell, J. concurring)(disputing existence of an implied cause of action "under Title VI"); *Cannon*, 441 U.S. at 687, 703, 706 n.40, 709 (implied cause of action "under Title IX"); *Bakke*, 265 U.S. at 281-84 (Powell, J.)(assuming without deciding the existence of an implied cause of action "under Title VI"), 328 (opinion of Brennan, White, Marshall and Blackmun, J.J.)(same), 419 (opinion of Justices Stevens, Stewart, Rehnquist, J.J. and Burger, C.J.); *see Davis v.Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669 (1999)("This Court has indeed recognized an implied private right of action under Title IX."); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69, 70 (1992).

[15] *Guardians*, 463 U.S. at 594 (White, J.), 635 n.1 (Stevens J., dissenting); *Cannon*, 441 U.S. at 699, 702 n.33; *Franklin*, 503 U.S. at 65.

Guardians had actually asserted a claim under the Title VI regulations, and the earlier opinions in *Bakke* and *Lau v. Nichols*, 414 U.S. 563 (1974), had also rested in part on those regulations, the broad characterization in *Cannon* and *Guardians* of the available cause of action was undoubtedly deliberate. The broad language of *Guardians* and *Cannon* tracks the wording of the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes fees for actions "to enforce . . . Title VI" as a whole, rather than applying only to violations of section 601. 42 U.S.C. § 1988(b). Imposition of the limitation proposed by petitioners would require this Court to ignore the actual language of *Guardians* and *Cannon*, and to read those opinions as if they instead referred solely to a cause of action "under section 601" to redress "violations of section 601."

B. This Court Has Repeatedly Assumed That Obligations under the Title VI Regulations Can Be Enforced in a Private Action

On a number of past occasions, litigants in this Court have presented, and this Court has not hesitated to resolve on the merits, claims under the Title VI regulations or under regulations issued pursuant to section 504 and Title IX.

Three years after *Guardians*, this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), decided a discrimination claim squarely based on a Title VI regulation. The petitioners in that case contended that North Carolina officials, in operating the state's federally assisted 4-H Clubs, had failed to desegregate those clubs in the manner required by Department of Agriculture regulations. In rejecting that claim, the Court held "for the reasons stated in the opinion of Justice White, that neither the Constitution nor the applicable Department of Agriculture regulations require more than what the . . . [state] has done . . . ." *Id.* at 387 (per curiam). Both the concurring

opinion of Justice White,[16] joined by four other members of the Court, and the dissenting opinion of Justice Brennan,[17] expressly addressed the merits of the petitioners' regulation-based claim.[18]

Bazemore's resolution of the merits of a regulation-based claim was consistent with the Court's similar action nine years before *Guardians* in *Lau v. Nichols*, 414 U.S. 563 (1974). *Cannon* described *Lau* as premised on an "implicit . . . assumption that . . . Title VI . . . created a private right of action." 441 U.S. at 702-03; *see id.* at 702 n.33. The merits of the decision in *Lau* rested squarely on the applicable federal regulation.

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[16] 478 U.S. at 408-09 ("Petitioners rely on the Department of Agriculture regulation requiring the [Agricultural Extension] Service to take 'affirmative action' to overcome the effects of prior discrimination in its programs. But the Service has taken affirmative action to change its policy . . . and it is the position of the United States and the federal parties that there has been full compliance with the regulation. In view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated.").

[17] 478 U.S. at 413-14 ("Respondents have never attempted to explain . . . how they are in compliance with this regulation, although they do not challenge its application to them. . . . The Court . . . dismisses the regulation in a paragraph asserting that a mere change in policy constitutes affirmative action. I disagree.").

[18] This Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992), does not hold or intimate that the Title VI disparate regulations are not enforceable in a private action. To the contrary, this Court specifically criticized the lower court for having failed to heed the manner in which *Bazemore* had analyzed a similar regulation-based claim in that case. *Id.* at 732 n.7.

The regulation at issue in *Fordice* was not the provision regarding disparate impact, but a regulation requiring "affirmative action" where past intentional discrimination had been proven. 34 C.F.R. § 100.3(b)(6)(i). That is the same regulation that was applied in *Bazemore*. The footnote in *Fordice* merely held, as did the majority in *Bazemore*, that that regulation had not been violated. *Bazemore* assumed that the corrective action required by that regulation is the same as is required by the Constitution.

> By § 602 of the Act HEW is authorized to issue rules, regulations and orders . . . HEW's regulations . . . specify that . . . . [d]iscrimination is barred which has [a discriminatory] effect even though no purposeful design is present . . . .[45 C.F.R.] § 80.3(b)(2).
>
> It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination *banned by the regulations*. . . .
>
> Respondent school district contractually agreed to "comply with . . . all requirements imposed by or pursuant to the Regulation" of HEW . . . .

Id. at 567-69 (citation omitted) (emphasis added).[19] Justice Stewart's concurring opinion relied expressly on regulations that had been issued by HEW pursuant to section 602, noting that it was unclear whether "§ 601 . . . standing alone" would forbid the practices in question. *Id.* at 570-71.

Similarly, this Court has repeatedly entertained and resolved on the merits private actions based on the regulations issued pursuant to section 504 of the Rehabilitation Act of 1973. In *Alexander v. Choate*, 469 U.S. 287 (1985), the plaintiff challenged a state imposed reduction in the number of days of hospital care provided under Medicaid, contending that that limitation had a disparate impact on the disabled. The plaintiff asserted, and this Court expressly resolved,

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[19] The Court's analysis of the merits of the case begins with the statement that "[w]e do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . . ." 414 U.S. at 566. This does not mean, as petitioners suggest, that the majority opinion does not rest on the Title VI regulation. To the contrary, the only explanation contained in the opinion for the result is an analysis of the HEW regulation that effectuates section 601. The quoted passage was intended to emphasize only that the Court was not relying on the constitutional argument, not that it was disregarding the implementing regulation.

claims under the § 504 regulations as well as under the statute itself.

> The question presented is whether the effect upon the handicapped that this reduction will have is cognizable under § 504 of the Rehabilitation Act of 1973 *or its implementing regulations*. We hold that it is not.[20]

The Court's determination of the regulation-based claim rested on a careful parsing of the terms of the applicable regulations.

> Regulations promulgated by the Department of Health and Human Services . . . . prohibit a recipient of federal funding from adopting "criteria or methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped." 45 C.F.R. § 84.4(b)(4)(ii)(1984).
>
> While these regulations, read in isolation, could be taken to suggest that a state Medicaid program must make the handicapped as healthy as the nonhandicapped, . . . 45 C.F.R. § 84.4(b)(2) . . . makes clear that Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users.

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20 469 U.S. at 289 (emphasis added); *see id.* at 294 n.10, 309.

469 U.S. at 304-06.[21] *Alexander* read the result in *Guardians* as meaning that discriminatory effects regulations were enforceable in private actions.[22]

School Board v. Arline, 480 U.S. 289 (1987), sustained the sufficiency of the plaintiff's complaint alleging discrimination on the basis of disability; the Court explained that "our holding is premised on the plain language of the Act, and on the detailed regulations that implement it." *Id.* at 286 n.15. The Court held that Arline "had a physical impairment as that term is defined by the regulation, since she had a 'physiological disorder or condition . . . affecting [her] respiratory [system].' 45 C.F.R. § 84.3(j)(2)(i)(1985)." *Id.* at 281. The Court remanded the case for a determination of whether Arline was "otherwise qualified" for her job, explaining that "[i]n the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. 45 C.F.R. § 64.3(k)." *Id.* at 288 n.17. The lower court was also directed to decide whether the school board could have "reasonably accommodated" Arline, an issue defined in and derived from the applicable federal regulations. *Id.* at 288 n.17. Virtually the entire analysis in *Arline* was grounded in regulation-based concepts, terminology and requirements, none of which could be found on the face of section 504 itself.

Finally, in *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999), the plaintiff relied on both Title IX and

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21 *See* 469 U.S. at 307-08 n.32 ("the current regulations are drafted in far too broad terms to permit the conclusion that state Medicaid programs must always choose, from among various otherwise legitimate benefit and service options, the particular option most favorable, or least disadvantageous, to the handicapped"), 308 (rejecting requirement of equal benefit for individuals with plaintiffs' handicap because they could "offer no reason that similar treatment would not have to be accorded other groups protected by statute or regulation from disparate-impact discrimination").

22 469 U.S. at 294 (1985) ("*Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make *actionable* the disparate impact challenged in this case" (emphasis added)).

Department of Education regulations in seeking to establish that the defendant was subject to the restrictions of Title IX. After rejecting Smith's statutory argument, the Court dealt separately with the merits of her regulation-based contention.

> The Third Circuit interpreted the Department's regulation to . . . extend[] Title IX to beneficiaries of federal funding as well as recipients. . . . The Third Circuit's reading of [34 C.F.R.] § 106.2(h) failed to give effect to the regulation in its entirety.

525 U.S. at 468.

Like this Court, the lower courts since *Lau* have repeatedly entertained and resolved on the merits claims arising under the Title VI, Title IX and section 504 regulations. *See* Appendices A and B. "This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon*, 441 U.S. at 706 n.40.[23]

III. AN IMPLIED CAUSE OF ACTION SHOULD BE RECOGNIZED TO REDRESS VIOLATIONS OF TITLE VI REGULATIONS THAT CREATE RIGHTS FOR A SPECIFIC CLASS OF PERSONS

Congress authorizes the promulgation of implementing regulations where it concludes that the creation and enforcement of those regulations are important to the effective administration of the statute itself. Having in Title VI both enacted a statutory requirement and authorized—indeed required—implementing regulations, it is unlikely that Congress would have contemplated that only the former could be enforced in a private civil action.

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[23] *Cannon* emphasized that prior to the adoption of Title IX the lower courts were in agreement that an implied cause of action existed under Title VI. 441 U.S. at 696. In one of the cases cited in *Cannon* at note 21, the plaintiffs had in fact successfully asserted a claim under a Title VI discriminatory effects regulation. *See Blackshear Residents Org. v. Housing Auth.*, 347 F.Supp. 1138, 1146-48 (W.D.Tex. 1972).

A. Enforcement Through an Implied Cause of Action Is as Appropriate for a Regulation as for a Statute

Nothing in the state of the law when Title VI was adopted suggests that Congress would have intended or even anticipated any distinction between private enforcement of the statute and private enforcement of its implementing regulations. The then-reigning decision of this Court regarding implied causes of action, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), treated as a single question the availability of a private cause of action under section 14(a) of the Securities Exchange Act and the availability of such a cause of action to enforce the SEC Rules that had been issued under that section.[24] By 1964, the federal courts had widely recognized an implied cause of action to enforce SEC Rule 10b-5, a mainstay of federal securities litigation. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380-81 n.10 (1983); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). In this era as well, "the federal courts routinely and consistently had recognized an implied private cause of action . . . for violations of the [1936 Commodities Exchange Act] or rules and regulations

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[24] Respondent alleged a violation of section 14(a) of the Act and of Rule 14a-9. The Court's decision drew no distinction between the statute and the Rule.

> [P]etitioners . . . emphasiz[e] that Congress made no specific reference to a private right of action in § 14(a) . . . .[W]e believe that a right of action exists . . . . While [the statutory] language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result. . . . Private enforcement of the proxy rules provides a necessary supplement to Commission action. . . . [T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.

377 U.S. at 431-32.

In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1084 (1991), this Court characterized *J.I. Case* as recognizing "an implied private right of action for the breach of § 14(a) *as implemented* by SEC Rule 14a-9." *Id.* at 1086-87 (emphasis added).

promulgated pursuant to the statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982).

It is difficult to believe that Congress in 1964 could have anticipated a distinction which was then largely if not entirely unknown to the law. Petitioners do not identify any decision by this Court—prior to or since 1964—that draws a distinction between private civil enforcement of a statute and private enforcement of that statute's implementing regulations.

It has long been a pillar of administrative law that duly authorized regulations have "the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). The decisions of this Court have repeatedly rejected suggestions that the commands embodied in regulations be accorded a lesser status, or be enforced in a different manner, than the provisions of statutes. *See Geier v. American Honda Motor Co.*, 120 S.Ct. 1913, 1917-18 (2000)(state law pre-empted where it "actually conflict[s] with [a regulation], hence with the Act itself"); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987)(federal "laws" enforceable against state officials under section 1983 can include regulations); *United States v. Mersky*, 361 U.S. 431, 434-38 (1960)(law authorizing the interlocutory appeal of dismissal of an indictment based on the "construction of the statute" encompasses an appeal regarding interpretation of a regulation issued under a statute).

Under the Rules of Decision Act, the federal courts are bound to apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652. This Court has never doubted that this exception encompasses provisions of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure promulgated under—but not, of course, contained in—the Rules Enabling Act, 28 U.S.C. § 2072.[25]

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[25] *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1 (1987)(Fed. R. App. P. 38); *Hanna v. Plumer*, 380 U.S. 460 (1965)(Fed. R. Civ. P. 4); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)(Fed. R. Civ. P. 35).

B. Congress Regarded Enforcement of the Title VI Regulations as Essential to the Overall Statutory Scheme

Congress attached particular importance to the role of regulations in the implementation of Title VI. Federal agencies are not only authorized but "directed" to issue regulations "to effectuate the provisions" of section 601. The statute contemplates that these regulations will contain "requirement[s]," not merely internal operating procedures, and provides that the regulations must be "approved by the President."

The central role attached to the regulations is understandable in light of the state of civil rights in 1964, particularly regarding discrimination in southern schools receiving federal assistance, a principal focus of the debates on Title VI. Ten years after *Brown v. Board of Education*, 347 U.S. 483 (1954), the vast majority of the public schools in the south remained all white or all black. Southern officials had resorted to a combination of defiance and artful stratagems to preserve segregation; a self-proclaimed attitude of "massive resistance" had frequently frustrated the federal courts, black students and their parents. Since the decision in *Brown*, almost a generation of black children had gone through the public schools in the south without ever attending an integrated class.

In this context, regulations were essential to serve two distinct purposes. First, by formulating detailed non-discrimination requirements, the federal agencies could thwart known schemes of evasion and preempt new tactics. In 1965, many federal agencies took just such prompt action, giving sufficient detail to the general prohibition against discrimination to thwart and deter efforts to circumvent Title VI. Although the substantive prohibition contained in section 601 consists of but a single sentence, the Title VI regulations of the Departments of Justice and Transportation, like those of several dozen other agencies, run to several pages each.

Second, the issuance of regulations permitted the federal government to deal at once with the emerging and evolving problems of discrimination, rather than waiting for years or

decades while the lower courts, and ultimately this Court, struggled with a wide variety of often unforeseeable constitutional disputes about the scope of the Equal Protection Clause. In 1964, Congress correctly anticipated that considerable delay would ensue before a definitive resolution of those issues; key constitutional decisions were still in the then distant future. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Washington v. Davis*, 426 U.S. 229 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In this context, individuals who could not enforce the mandated regulations would have faced precisely the uncertainty and protracted legal disputes that the regulations were intended to avoid.

C. The Administrative Limitations in Section 602 Do Not Provide a Basis for Rejecting Private Enforcement of the Title VI Obligations and Rights Arising under That Section

(1) Petitioners contend that allowing private enforcement of Title VI regulations will result in the circumvention of the limitations on agency action set out in section 602. (Pet. Br. at 28). That argument against a private cause of action is not new. It has on repeated occasions been made to, and rejected by, this Court.

In *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the defendants specifically argued that section 602 precluded a private cause of action because the federal agency concerned had not taken the steps which, under section 602, were prerequisites to agency enforcement.[26] Justice White's separate opinion in *Bakke* would have rejected any implied cause of action under Title VI precisely because of his view that such a private action would "short circuit the procedural preconditions provided in Title VI. . . . [I]t is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites." *Id.* at 383; *see id.* at 383 n.2, 385. The opinions of Justice Stevens, Stewart, Rehnquist and the Chief Justice, which concluded that an implied cause

[26] Supplemental Brief for Petitioner at 62-64, *Bakke* (No. 76-811).

of action existed under Title VI, expressly rejected this argument.[27]

In *Cannon*, the court of appeals, in refusing to imply a private cause of action under Title IX, had expressly relied on the language of Title IX identical to section 602. Referring to 20 U.S.C. § 1682, the Seventh Circuit reasoned:

> The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort . . . . It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act.

559 F.2d 1063, 1073 (7th Cir. 1977); *see id.* at 1081, 1082. In this Court, the defendant urged that an administrative complaint was the plaintiff's exclusive remedy.[28] The United States argued, to the contrary, that private actions "would effectively complement the administrative enforcement mechanism provided under the statute."[29] In his dissenting opinion in *Cannon*, Justice White again emphasized the procedural prerequisites in section 602 and the comparable provision of Title IX; insisting that administrative action was the intended enforcement mechanism, he objected that the implied cause of action "entirely displaces that scheme in

[27] 438 U.S. at 420 n.26 (Stevens, J., concurring in part, dissenting in part).

[28] Brief for Respondents at 19, 37, 38, *Cannon* (No. 77-926)("the doctrine of exhaustion militates against the implication of a private right of action").

[29] Brief for Federal Respondents at 14, *Cannon* (No. 77-926)("The existence of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on sex discrimination in federally financed education programs.").

favor of a different approach." 441 U.S. at 729; *see id.* at 721. The majority in *Cannon* rejected this contention.[30]

In *Guardians* the defendant reiterated this twice rejected argument, citing Justice White's opinion in *Bakke* and insisting that a private remedy under Title VI was inconsistent with "Title VI's sole emphasis on administrative enforcement (section 2000d-1)."[31] Justice Powell argued that the existence of the section 602 administrative enforcement provisions was inconsistent with any implied cause of action under Title VI. 463 U.S. at 609-10 & nn. 2 and 3. But a majority of the Court was again unpersuaded by these arguments.

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court expressly resolved in the context of Title IX the relationship between an implied cause of action and the notice and determination clause of that statute. The Court concluded that the existence of an implied cause of action was consistent with that clause, but that the clause mandated certain limitations on the circumstances in which a private plaintiff could obtain damages:

> [A] central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures. . .
>
> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to

30 441 U.S. at 707 n.41 ("It has been suggested that, at least in the absence of an exhaustion requirement, private litigation will interfere with HEW's enforcement procedures under § 902 of Title IX. The simple answer to this suggestion is that the Government itself perceives no such interference under the circumstances of this case, and argues that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time.").

31 Brief for Respondents at 8, *Guardians* (No. 81-431).

> the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.

Id. at 289 (emphasis in original). The remedial limitation imposed by *Gebser* on private civil actions was expressly confined to claims for monetary relief. *Id.* at 290-92. Since *Guardians*, however, it has been understood that damages are not available in a suit to enforce the discriminatory effects regulations, and they were not sought here.

The fatal problem with petitioners' contention is that it proves too much. As Justice White emphasized in *Bakke* and *Cannon*, and as Justice Powell argued in *Guardians*, acceptance of that argument leads to the conclusion that an implied cause of action is never permissible under Title VI. Petitioners repeatedly advance just that contention. (Pet. Br. at 29, 37, 43). But such an argument does not provide a basis for treating Title VI regulation claims differently from section 601 claims.

(2) Most of the provisions of section 602 on which petitioners rely expressly serve only to establish preconditions that must be met before an agency terminates funding;[32] those restrictions do not apply to a civil action by the United States, and have no possible relevance here. The only prerequisites to a civil action by the United States are prior notice of the violation to "an appropriate person" and a determination by the agency that "compliance cannot be secured by voluntary means," 42 U.S.C. § 2000d-1, preconditions that also apply to fund termination. In a private civil action such as this, petitioners object, no such notice and determination has occurred.

32 There are five statutory prerequisites to termination: (a) the opportunity for a hearing, (b) an express finding on the record of a failure to comply with a section 602 requirement, (c) the issuance of a written report, (d) the filing of that report with the relevant committees of the House and Senate, and (e) a delay of thirty days after the filing of the report. 42 U.S.C. § 2000d-1

Congress, however, intended the notice and determination clause to operate as a prerequisite only to agency action. As the United States noted in its supplemental brief in *Bakke*, it is entirely understandable that Congress would establish for enforcement actions by the executive branch of the national government constraints that it did not deem necessary for private plaintiffs. "[Private actions] would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602."[33] The litigation and other enforcement resources of the federal government are usually far greater than those of a private plaintiff and carry a greater risk of overpowering an ordinary defendant. In 1964 legal disputes between federal and state or local officials about the then highly emotional issue of civil rights raised delicate issues of federal-state relations; a Congress which had witnessed a series of well publicized collisions between state and federal officials was understandably anxious to avoid such situations where possible. The enactment of Title VI was resisted by southern officials precisely because it would bring federal executive agencies into a greater role in the enforcement of civil rights, an area which prior to 1964 had depended largely on private legal actions. It is entirely understandable that Congress would choose to impose on those agencies, but not private litigants, the procedural constraints in section 602. Those requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate.[34]

Lastly, the notice and determination clause of section 602 does not provide a basis for imposing on discrimination victims an administrative exhaustion requirement. This Court expressly rejected any such requirement in *Cannon*. 441 U.S.

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[33] Supplemental Brief for the United States at 30 n.25, *Bakke*, (No. 76-811).

[34] The legislative history of Title VI reveals an understanding that the limitations in section 602 would not apply to actions by private individuals. *Cannon*, 441 U.S. at 712 n.49.

at 706 n.41.[35] The lower courts retain the discretion to solicit in any Title VI case the views or assistance of the relevant federal agency. *Cannon*, 441 U.S. at 688 n.8; *Rosado v. Wyman*, 397 U.S. 397, 406-07 (1970).

There is no reason to conclude that the availability of private actions to enforce the discriminatory effects regulations will either overwhelm the courts or wreak havoc on recipients. The availability of such private actions has been unquestioned in the lower courts for almost thirty years;[36] there is no evidence that the resulting "litigation has

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[35] If the notice and determination clause were converted into an exhaustion requirement, the resulting rule would be exceedingly strange and harsh.

An aggrieved individual would have to seek from the federal agency a finding of illegality and a determination that voluntary compliance could not succeed. The statute itself, however, contains neither a clear requirement that the agency act on such a complaint, nor any time limitation; at best complainants aggrieved by inaction or delay might have an action against the agency under the Administrative Procedure Act.

If the agency were to conclude that no violation of the law had occurred, that would be fatal to the aggrieved party; that harsh consequence would raise grave due process problems, because agency regulations accord recipients, but not discrimination victims, a right to participate in the investigation and determination process. *Cannon*, 441 U.S. at 707 n.41. If the complainant could convince the agency that there was indeed a violation, that would only open the door to a judicial proceeding against the recipient, in which the same issues would have to be relitigated.

Where, in framing the Civil Rights Act of 1964, Congress wanted to establish an exhaustion requirement, it did so expressly. Section 706 of Title VII requires victims of employment discrimination, prior to bringing a civil action, first to complain to the EEOC (or similar state agency) and afford it an opportunity to investigate and conciliate the case. But under section 706, the EEOC is obligated to make those efforts, the complainant is required to await agency action for only 180 days, and an agency finding of illegality is clearly not a prerequisite to legal action. It is exceedingly unlikely that Congress, having cabined the limited section 706 exhaustion requirement with such specific safeguards, meant silently to impose in section 602 a far more draconian, oftentimes fatal, exhaustion rule.

[36] *See, e.g., Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D.Tex. 1972); *see* Appendices A and B.

been so costly or so voluminous that either [recipients] or the courts have been unduly burdened." *Cannon*, 441 U.S. at 709.

D. Rejection of Private Enforcement of the Title VI Regulations Would Have Anomalous Consequences

Restricting private litigation to the enforcement of section 601 itself, while permitting only federal agencies to enforce the Title VI regulations, would have peculiar collateral consequences that Congress could hardly have wanted.

Such a scheme would, over time, result in the creation under Title VI of two increasingly distinct sets of standards; enforcement by the government would apply the standards in the regulations, while in private actions a separate set of judge-made rules interpreting the statute would be utilized. Regulations designed to clarify the law would in practice only clarify the law in disputes to which the agency itself was a party. Federal judges would be compelled to reach their own, at times conflicting, answers to legal and practical issues already addressed by existing regulations. Complainants who contended that disputed actions by a recipient violated both section 601 and the Title VI regulations would be compelled to divide their claims, pursuing the section 601 claim in court[37] while asking the agency to act on the regulation-based claim.

Where the statute itself embodies a constitutional standard, the unavailability of the regulation in private actions would require the federal courts to resolve on a constitutional basis an issue that the agency had in fact resolved by regulation.[38] That is precisely the opposite of the practice

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[37] Utilization of the courts to address the section 601 claim would ordinarily be imperative, since complainants have no right to participate in agency investigations or hearings, and agencies lack the authority to provide all needed relief.

[38] The lower courts recognized long ago that by relying on the Title VI regulations to resolve a complaint they could avoid reaching constitutional issues. *E.g.*, *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D.Tex. 1972).

mandated by this Court's decision in *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring).

Until now, the lower courts have generally held that individuals cannot bring an action under the Administrative Procedure Act to compel federal agencies to enforce Title VI; these cases are expressly premised on the assumption that such suits would be unnecessary because the plaintiffs have a private right of action directly against the recipient engaging in discriminatory practices.[39] A scheme precluding private parties from enforcing Title VI regulations would compel the opposite conclusion, transforming what is now a regulation-based dispute between the discrimination victim and the funding recipient into a dispute between that victim and the federal agency.[40] Because suits against those agencies would be the only option open to discrimination victims barred from obtaining redress from the recipient, federal officials would have to devote resources to defending their actions (or inactions) and to assuring that the investigation and resolution of administrative complaints would withstand judicial review. Even in the absence of these pressures, agencies would legitimately feel obligated to attach a greater priority to pursuing regulation-based complaints, even those affecting only individuals, to the exclusion of investigating cases of intentional discrimination, because those complainants would simply have no other forum to which they could turn.

The unavailability of private actions to enforce the Title VI regulations would leave significant gaps in the overall enforcement structure. Although the Title VI regulations

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[39] *See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999); *Washington Legal Found. v. Alexander*, 984 F. 2d 483, 485-86 (D.C.Cir. 1993); *Women's Equity Action League v. Cavasos*, 906 F.2d 742, 750-51 (D.C.Cir. 1990).

[40] "[I]f no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. *E.g.* , *Adams v. Richardson*, . . . 480 F. 2d 1159 (D.C. Cir.1973). But, surely this alternative is far more disruptive of HEW's efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be." *Cannon*, 441 U.S. at 707 n.41.

forbid retaliation against individuals who complain or provide information to the United States about Title VI violations, 28 C.F.R. § 42.107(e), the statute itself has no such provision. Any administrative action would be palpably insufficient, because the agency administrative processes do not contain provisions for either preliminary injunctive relief or retrospective monetary awards. The absence of private enforcement would encourage recipients to interfere with Title VI complaints and would tend to obstruct agency enforcement generally. *See Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242, 254 (5th Cir. 1997)(Title IX).

The availability of a private cause of action to obtain injunctive relief is especially important because damages and back pay cannot be obtained to redress violations of the discriminatory effect regulations. Because this Court's decision in *Guardians* precludes monetary awards under the regulations, recipients of federal funds already have "little incentive to shun practices of dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)(importance of monetary relief under Title VII). If private civil actions are not available, funding recipients will have even less incentive to comply with these regulations.[41]

Without the ability to enforce directly an applicable Title VI regulation, individuals whose rights were violated would in some instances be driven to more awkward and unpredictable methods of invoking federal law. The regulations would remain the law of the land, and could, for example, be invoked under the Supremacy Clause as a defense to a state proceeding. *See Thorpe v. Housing Auth.*, 393 U.S. 268 (1969). In the instant case, for example, if Mrs. Sandoval were denied a driver's license in violation of the Title VI regulations, she could presumably invoke those regulations if she were later prosecuted for driving without a license. But such awkward self-help measures would be

[41] Recipients understand full well that there is no possibility that violations of Title VI or its implementing regulations will ever lead to funding termination; there have been virtually no such terminations in the thirty-six years since the adoption of Title VI.

impracticable for most individuals injured by violations of the Title VI regulations.

E. The Existence of an Implied Cause of Action to Enforce the Title VI Regulations Is Consistent with the Standards of *Cort v. Ash*

Cannon v. University of Chicago applied the four-part standard of *Cort v. Ash*, 422 U.S. 66 (1975), in concluding that a cause of action exists under Title IX. Application of the *Cort* factors to a Title VI regulation claim yields the same result; indeed, the terms of the two analyses are virtually indistinguishable.

First, *Cannon* concluded that Title IX was "enacted for the benefit of a special class of which the plaintiff is a member," 441 U.S. at 689; this finding applied to Title IX as a whole, which the Court emphasized was patterned after Title VI.[42] The discriminatory effects regulations in the instant case, like many Title VI regulations, were adopted for the benefit of the same special class as was Title VI as a whole; the regulations to which Title VI commands obedience are expressly mandated "to effectuate" the statute.[43]

Second, *Cannon* noted that the legislative history of Title VI contained frequent statements assuming the existence of a private action and was devoid of "any hostility toward an implied private remedy." 441 U.S. at 711-13. These

[42] The Court reasoned that "Title IX was patterned after Title VI," 441 U.S. at 694, *not* simply that section 1681(a) was patterned after section 601.

[43] The specific regulations in this case forbid the utilization of "criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin." 49 C.F.R. § 21.5(b)(2)(DOT); *accord* 28 C.F.R. § 42.104(b)(2)(DOJ)("individuals" rather than "persons"). That express delineation of the protected individuals is precisely the sort of right-creating language that *Cannon* regarded as dispositive. 441 U.S. at 690 n.12.

legislative references to private enforcement are framed in broad terms not limited to section 601.[44]

Third, *Cannon* recognized that private lawsuits would be "at least helpful to the accomplishment of the statutory purpose." 441 U.S. at 703; *see id.* at 704. Enforcement of the Title VI regulations would, by definition, have such a salutory effect, because the regulations themselves must "effectuate the provisions" of section 601. 42 U.S.C. § 2000d-1. One of the central objectives of Title VI, like Title IX, was "to provide individual citizens effective protection." 441 U.S. at 704. As the Court explained in *Cannon*, there are many circumstances in which administrative action is unlikely to be an appropriate or practicable method of affording that protection. *Id.* at 705 & n.37. Federal agencies often lack the resources to investigate or resolve possible violations of Title VI or its implementing regulations. *Id.* at 708 n. 42. This point is as true of complaints regarding discriminatory effects forbidden by the Title VI regulations as it is of discriminatory intent prohibited by section 601.

Fourth, as in *Cannon*, the subject matter of claims arising under Title VI regulations does not involve an area that has traditionally been the exclusive province of the states. "No such problem is raised by a prohibition against invidious discrimination of any sort . . . . Since the Civil War, the Federal Government and the federal courts have been the '"primary and powerful reliances"' in protecting citizens against such discrimination." *Id.* at 708 (citation omitted).

IV. CONGRESS HAS RATIFIED AND BUILT ON THIS COURT'S DECISIONS TREATING AS ACTIONABLE CLAIMS UNDER TITLE VI, TITLE IX AND SECTION 504 REGULATIONS

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court unanimously reaffirmed its prior

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[44] *See, e.g.*, 110 Cong. Rec. 6545 (1964)(Sen. Humphrey) ("litigation by private parties"), 7067 (Sen. Ribicoff)("lawsuits to end discrimination").

decisions in *Cannon* and *Guardians*, emphasizing that those decisions had been ratified by Congress in 1986.

> In the Rehabilitation Act Amendments of 1986, . . . 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. This statute cannot be read except as a validation of *Cannon*'s holding.

Id. at 72. In a separate opinion, Justice Scalia agreed with this reading of the 1986 legislation.

> The Rehabilitation Act Amendments of 1986 . . . must be read, in my view, not only "as a validation of *Cannon*'s holding," . . . , but also as an implicit acknowledgement that damages are available.

Id. at 78. In reaching the conclusion that Congress intended to ratify the decision in *Cannon*, the Court in *Franklin* relied not only on the 1986 enactment of the Rehabilitation Act Amendments, but also on the passage in 1988 of the Civil Rights Restoration Act. 503 U.S. at 73. Both statutes apply to Title VI and section 504 as well as to Title IX. *See* 42 U.S.C. §§ 2000d-4a, 2000d-7. The Civil Rights Restoration Act significantly expanded the range of programs and activities covered by Title VI, and the Rehabilitation Act Amendments strengthened the remedies available in a private action.

The implied cause of action ratified by Congress in these two statutes presumptively encompasses the practice of this Court and the lower federal courts of treating as actionable regulation-based claims under Title VI, Title IX, and section 504.[45] When Congress adopted the Rehabilitation Act Amendments and the Civil Rights Restoration Act, it knew full well that the courts had consistently treated the Title VI

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[45] As the court of appeals noted, when Congress enacted the 1986 Rehabilitation Act Amendments, "[t]here is no evidence that [it] somehow differentiated between suits to enforce the statute and suits to enforce the regulations promulgated thereunder when it constructed its abrogation/waiver provision." Pet. App. 16a n.5.

regulations as creating rights that could be enforced in private actions. *Cf. United States v. Wells*, 519 U.S. 482, 496 (1997). The 1988 statute was adopted after this Court's decisions in *Lau*, *Guardians*, *Bazemore*, *Alexander*, and *Arline*, and in the wake of a number of lower court decisions enforcing regulations issued under Title VI, Title IX, and section 504. *See* Appendix A. During the four years of hearings and debates on the Civil Rights Restoration Act, opponents of the legislation relied on the fact that the regulations were privately enforceable in an effort to raise the specter that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients. The Executive Branch submitted to Congress a memorandum expressly warning that if the bill were passed "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance."[46]

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[46] Civil Rights Act of 1984: Hearings on S. 2586 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 527 (1984)(emphasis in original). The memorandum, prepared by the Office of Management and Budget, and submitted to Congress in response to this proposed legislation, explained that "[the bill] would . . . open all of a recipient's activities to private lawsuits over practices deemed to have 'discriminatory effects,' regardless of intent." Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong. 2d Sess. 532 (1984); *see id.* at 530 ("Any assistance to a State or city government would, for example, apply such [disparate impact regulations] to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have 'discriminatory effects' would now be covered *by the existing regulations* for the first time and would be subject to agency enforcement activities *and private lawsuits*.")(second emphasis added).

Senator Hatch warned that just as federal agencies could bring administrative enforcement actions against recipients whose practices had a disparate impact on minorities, "advocacy groups will be able to bring private lawsuits making the same allegations before federal judges." 134 Cong. Rec. 4257 (1988); *see id.* at 99-100 (remarks of Sen. Hatch)(discussing enforcement of disparate impact regulations by private plaintiffs).

Despite these objections to private enforcement of the regulations issued under the civil rights statutes, Congress adopted the Restoration Act expanding the coverage of Title VI and the other statutes and adopted the Rehabilitation Act Amendments strengthening the remedies for private plaintiffs. In addition to these statutes, Congress has repeatedly amended Title VI,[47] Title IX,[48] and section 504.[49] "[T]he fact that a comprehensive reexamination and significant amendment of [an act of Congress] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress intended to preserve that remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 381-82 (1982); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

Congress also has repeatedly adopted other legislation which builds on established enforcement practices, relying for its implementation on the regulation provisions of, or

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[47] Improving America's Schools Act of 1994, sec. 392, Pub. L. No. 103-382, 108 Stat. 4026 (1994); Department of Education Organization Act, sec. 301, sec. 508, Pub. L. No. 96-88, 93 Stat. 677, 692 (1979); Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 91-230, 84 Stat. 121 (1970); Elementary and Secondary Education Amendments of 1967, sec. 112, Pub. L. No. 90-247, 81 Stat. 787 (1968); Elementary and Secondary Education Amendments of 1966, sec. 182, Pub. L. No. 89-750, 80 Stat. 1209 (1966).

[48] Age Discrimination in Employment Amendments of 1986, sec. 6, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Department of Education Organization Act, sec. 301, Pub. L. No. 96-88, 93 Stat. 677 (1979); Education Amendments of 1976, sec. 412, Pub. L. No. 94-482, 90 Stat. 2234 (1976); Pub. L. No. 93-568, sec. 3, 88 Stat. 1862 (1974); Education Amendments of 1972, sec. 901, Pub. L. No. 92-318, 86 Stat. 373 (1972).

[49] Workforce Investment Act of 1998, sec. 408(a)(3), Pub. L. No. 105-220, 112 Stat. 1203 (1998); National Education Statistics Act of 1994, sec. 394, Pub. L. No. 103-382, 108 Stat. 4028 (1994); Rehabilitation Act Amendments of 1992, Pub. L. No.102-569, 106 Stat. 4344 (1992); Handicapped Programs Technical Amendments Act of 1988, sec. 207, Pub. L. No. 100-630, 102 Stat. 3312 (1988); Rehabilitation Act Amendments of 1986, sec. 103(d), Pub. L. No. 99-506, 100 Stat. 1810 (1986); Rehabilitation Comprehensive Services, and Development Disabilities Amendments of 1978, sec. 16, sec. 119, Pub. L. No. 95-602, 92 Stat. 2982, 2987 (1978).

provisions similar to those in, Title VI, Title IX, and section 504. *Cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994). A series of enactments after *Lau* defined particular federal programs as constituting assistance under Title VI, in order to bring them within the scope of that statute and its implementing regulations.[50] From 1971 to 1992, Congress adopted nine statutes forbidding gender based discrimination in specific federally assisted programs, each of which was modeled on Title VI and its provisions for implementing regulations.[51] Part II A of the 1990 Americans With Disabilities Act, which forbids discrimination in the public services of any state or local government, mandates the issuance of regulations and incorporates by reference the enforcement mechanisms of Title VI. *See Olmstead v. L.C.*, 527 U.S. 581, 590 n.4 (1999).[52] In adopting the ADA and these earlier statutes,

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[50] 23 U.S.C. §§ 108(c)(2), 182(c)(1)(applying Title VI to Department of Transportation funds for land acquisition); 39 U.S.C. § 410(b)(6)(applying Title VI to the Postal Service); 42 U.S.C. §§ 608(d)(4)(applying Title VI to aid to needy families with children), 1437d(r)(1)(applying Title VI to assisted housing program), 1437aaa-1(c)(2)(E), 1437aaa-2(d)(2)(m)(applying Title VI to Hope for Public Housing Program), 1760(l)(4)(M)(i)(applying Title VI to school lunch program), 5057(b)(applying Title VI to domestic volunteer services program), 8013(j)(2)(applying Title VI to congregate housing program), 10406(a)(1)(applying Title VI to family violence prevention program), 11386(a)(2)(G)(applying Title VI to supportive housing program), 11394(a)(11)(applying Title VI to Safe Havens for Homeless Individuals program), 12635(b)(applying Title VI to National and Community Service program), 12872(c)(2)(E), 12873(d)(2)(m)(applying Title VI to Hope for Homeownership of Multifamily Dwellings program), 12892(c)(2)(E)(applying Title VI to Hope for Homeownership of Single Family Dwellings program).

[51] 15 U.S.C. § 775 (May 7,1974), 23 U.S.C. § 324 (Aug. 13, 1973), 40 U.S.C. § 476 (Oct. 17, 1976), 42 U.S.C. §§ 300x-57(a)(3) (July 10, 1992), 3123 (Aug. 5, 1971), 5891 (Oct. 11, 1974), 6709 (July 22, 1976), 9821 (Aug. 13, 1981), 9849(b) (Aug. 13, 1981), 10406(a)(2) (Oct. 9, 1984). Several of these provisions also prohibit discrimination on the basis of religion.

[52] The statute provides that Part IA of the ADA will be enforced by means of "[t]he remedies, procedures, and rights set forth in section 794a of title 29." 42 U.S.C. § 12133. Section 794a is the enforcement

Congress can be assumed to have understood that this legislation would be enforced in the manner that had occurred in *Lau*, *Bazemore*, *Arline*, and *Alexander*. Any significant after-the-fact restriction on the use of private litigation to enforce Title VI regulations would limit the enforcement of these subsequently enacted laws and their implementing regulations in a manner Congress clearly could not have envisioned. It would be anomalous if Title VI itself were now interpreted more narrowly than the later enforcement provisions avowedly based on Title VI itself.

In light of the pervasive congressional activity in this area, Congress' decision not to act in the face of a quarter century of judicial enforcement of anti-discrimination regulations can fairly be deemed to reflect acquiescence in that practice. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1313 (2000); *Evans v. United States*, 509 U.S. 255, 268-69 (1992).

V. THE CONSTITUTION DOES NOT REQUIRE THAT SPENDING CLAUSE LEGISLATION PROVIDE RECIPIENTS WITH A CLEAR STATEMENT OF HOW AND BY WHOM THEIR LEGAL OBLIGATIONS WILL BE ENFORCED

Petitioners urge this Court to adopt a new constitutional limitation on Spending Clause legislation. They propose that recipients of federal funds, even if they knowingly violate the conditions appurtenant to that grant, be immune from suit unless the federal statute contains an unequivocal statement both warning recipients that they could be sued for such violations and identifying the class of parties who could bring such lawsuits. The prior decisions of this Court provide no

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provision of section 504, which in turn expressly incorporates by reference the remedies, procedures and rights of Title VI.

The lower courts have recognized a private cause of action to enforce the regulations issued under Part IA. *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1334 (S.D.Cal. 1997), *aff'd*, 172 F.3d 876 (9th Cir. 1999); *Miller v. City of Johnson City, Tenn.*, No. 2:94-CV-246, 1996 WL 406679, at * 2 (E.D.Tenn. 1996); *McCready v. Michigan State Bar*, 881 F. Supp. 300, 306 (W.D.Mich. 1995).

support for such a novel constitutional requirement. Those decisions already recognize three other clear statement rules; the combined effect of these existing doctrines provides ample protection for recipients of federal funds and for the principles of federalism implicated by Spending Clause legislation.

First, this Court's decisions in *Pennhurst State School v. Halderman*, 451 U.S. 1, 17-18 (1981), and its progeny adopt a principle of statutory construction that interprets Spending Clause legislation to impose on fund recipients only those substantive legal obligations of which they could have been aware when they made the choice to accept the federal funds at issue. Federal law, of course, need not "prospectively resolve every possible ambiguity concerning particular applications of the . . . requirements." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). This notice requirement is easily satisfied in the instant case. Title VI expressly alerts recipients that they must adhere to requirements set out in any "rules, regulations, or orders of general applicability" issued by the granting agency. 42 U.S.C. § 2000d-1. The Departments of Justice and Transportation promulgated the disparate impact regulations at issue in this case many years ago. *See* 28 C.F.R. § 42.104(b)(2)(first promulgated in 1966); 49 C.F.R. § 21.5(b)(2)(first promulgated in 1970). The applicability of those regulations to practices that disproportionately burden non-English speakers has long been set out in another Justice Department regulation, 28 C.F.R. 42.405(d)(1), and was emphasized by this Court's decision in *Lau v. Nichols*, 414 U.S. at 568. The assurances which Alabama officials signed as a condition of receiving federal funds included promises to abide by the terms of the federal regulations. App. 129a, 142a; *see* Pet. Br. at 11. In this instance, the Attorney General of Alabama expressly called to the attention of state officials the relevant provisions of federal law and the decision in *Lau*.

Second, the decisions of this Court recognize that in certain circumstances, it may not be practicable for recipients, although conversant with federal statutes and regulations, to know whether violations of those requirements are

occurring.[53] In such situations, private litigants may be entitled to injunctive relief, but not to damages for past violations that responsible officials could not with reasonable care have prevented. *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669-75 (1999); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 287-92 (1998); *Guardians Ass'n v. Civil Serv. Commission, N.Y.C.*, 463 U.S. at 597-607 (White, J.). This limitation on the remedies that may be available under Title VI has no application to the instant case, because the plaintiffs seek only injunctive relief.

Third, this Court's Eleventh Amendment decisions mandate that federal legislation not be construed to subject a *state* to suit in federal court unless congressional intent to authorize such actions is clear on the face of the statute in question. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). With regard to Title VI, however, Congress has in fact adopted just such legislation. 42 U.S.C. § 2000d-7. In the instant case, moreover, respondents need not invoke that legislation, because the complaint sought and the courts below awarded injunctive relief against petitioner Alexander, in his capacity as Director of the Alabama Department of Pubic Safety. *See Ex parte Young*, 209 U.S. 123 (1908).

Petitioners insist, however, that there should be yet a fourth clear statement rule. Recipients of federal funds, they urge, are entitled to know in advance not only what obligations come with those funds, but also both how and by whom these conditions will be enforced. Because the cause of action in the instant case is implied, rather than expressly authorized in the terms of Title VI, petitioners object that they did not receive the requisite notice and cannot be subject to suit. (Pet. Br. at 27-29).

This contention demonstrably proves too much. The issue in this case is whether the long established implied cause of action "under Title VI" should be limited to enforcing the obligations established by section 601 or should also

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[53] These decisions are based on interpretations of the particular statutes at issue, rather than on any constitutionally mandated rule of construction.

encompass enforcing the obligations created by the Title VI regulations. Petitioners' contention does not support treating differently an implied cause of action to enforce section 601 duties and an implied cause of action to enforce Title VI regulation-based obligations; if their contention were accepted, *any* implied cause of action would be impermissible.[54]

Petitioners do not explain why a recipient of federal funds should be accorded immunity from suit to enforce well-known funding conditions solely because there was no clear advance notice of *which* parties might bring such actions. Petitioners appear to imply that principles of federalism entitle states to assume that they will be able to violate applicable federal laws with impunity unless they are expressly warned how, and by whom, enforcement may occur. Neither the decisions of this Court nor the "etiquette of federalism" require solicitude for recipients who violate federal law in the hope they will not be sued or who express even genuine surprise that the victims of those violations can seek to obtain redress in federal court. In the area of criminal law, the Constitution requires clear notice of what conduct is prohibited and of the level of sanction that may be imposed for a violation, but it has never been thought to entitle lawbreakers to prior notice of the identity of the police officers who may apprehend them.

Pennhurst provides no support for petitioners' proposed new clear statement rule. Petitioners attribute to *Pennhurst* a holding that in Spending Clause legislation, "Congress must 'unambiguously' create the cause of action, *Pennhurst State School v. Halderman*, 451 U.S. 1, 17." Pet. Br. at 20.; *see id.* at 16, 35, 36. The question resolved in *Pennhurst*, however, was *not* whether the statute in that case could be enforced by means of an implied cause of action; to the contrary, this Court expressly did not reach that question.[55]

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[54] Petitioners indeed appear to insist that *any* implied cause of action would be impermissible. Pet. Br. at 19.

[55] 451 U.S. at 10 ("Petitioners first contend that 42 U.S.C. § 6010 does not create in favor of the mentally retarded any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. . . . Rather, the issue was whether the provision of the statute on which the plaintiffs there relied actually forbade the conduct about which they had complained. The word "unambiguously" was used in the *Pennhurst* opinion in a statement about a state's substantive duties, not about the existence of a cause of action. It was with regard to the asserted duty to provide certain medical treatment that *Pennhurst* insisted that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U.S. at 17.

This Court concluded in *Pennhurst* that the provision in question was merely precatory and imposed on the state no substantive obligations at all. Petitioners do not deny that Title VI and the section 602 regulations create specific legal obligations or that, as a condition of receiving federal funds, they assured the United States that they would meet those conditions. Petitioners simply seek to avoid private judicial enforcement of these obligations and assurances. "The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of [Title VI] could not be more stark." *School Bd. v. Arline*, 480 U.S. 289, 287 n.15 (1987).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. . . . Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.").

Respectfully submitted,

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APPENDICES

APPENDIX A

Lower Court Cases Brought Pursuant to Regulations Issued under Title VI, Title IX, and § 504 of the Rehabilitation Act prior to Enactment of the Civil Rights Restoration Act[1]

A. Circuit Court Decisions

David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) (alleging violation of Title VI and 28 C.F.R. 42.104; "plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations")

Disabled in Action v. Sykes, 833 F.2d 1113, 1114 (3d Cir. 1987) (holding that defendant's compliance with one section of § 504 regulations "did not excuse compliance with the accessibility requirements" of another section of regulations)

Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1045 (7th Cir. 1987) (upholding plaintiffs' Title VI claim based on the implementing regulations "even though there was no allegation in the complaint that the defendants acted with a discriminatory intent")

Paisey v. Vitale, 807 F.2d 889, 892 (11th Cir. 1986) (citation omitted) (alleging that defendant's actions "are proscribed activity when 'read in pari materia with 34 C.F.R. 100.7(e) implementing Title VI of the Civil Rights Act of 1964'")

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[1] The Civil Rights Restoration Act was enacted on March 22, 1988.

Latinos Unidos de Chelsea en Accion (LUCHA) v. Secretary of HUD, 799 F.2d 774, 783 (1st Cir. 1986) (alleging violations of Title VI regulation, 24 C.F.R. § 1.4)

Craft v. Board of Trustees, 793 F.2d 140, 142 (7th Cir. 1986) (recognizing that Title VI regulations allow for "limited prospective relief . . . under a theory of disparate impact")

Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)(internal footnote omitted) ("There is no doubt that the plaintiffs predicated this cause of action on the [Title VI] regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims.")

Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984) ("[I]n light of appellee's reliance on the regulations [issued pursuant to Title VI], we find it appropriate to apply a discriminatory effect analysis.")

Haffer v. Temple Univ., 688 F.2d 14, 15 n.1 (3d Cir. 1982) (alleging that defendant did not comply with Department of Education regulations issued under Title IX)

Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1376, 1377 (11th Cir. 1982) (alleging that defendant violated 49 C.F.R § 27.31, issued pursuant to § 504 of the Rehabilitation Act)

New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 852 (10th Cir. 1982) ("Relevant to this action are those [§ 504] regulations directed at handicapped services offered by . . . public schools . . . . It is against this regulatory backdrop that the State's special education system was examined and found wanting at trial.")

Doe v. New York Univ., 666 F.2d 761, 770 (2d Cir. 1981) (alleging that defendant violated § 504 regulations)

Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 656 (6th Cir. 1981) (alleging the defendant's rules violated Title IX regulation, 45 C.F.R. § 86.41)

Alexander v. Yale Univ., 631 F.2d 178, 185 (2d Cir. 1980) (alleging that defendant failed to comply with Title IX regulation, 45 C.F.R. § 86.8(b))

Baker v. Bell, 630 F.2d 1046, 1048-49 & n.4 (5th Cir. 1980) (alleging violation of § 504 of Rehabilitation Act and its implementing regulations)

Serna v. Portales Mun. Sch., 499 F.2d 1147, 1153-54 (10th Cir. 1974) (holding that the defendant school violated Title VI and Title VI regulations because its curriculum had "the effect of discrimination even though probably no purposeful design")

Allen v. Mississippi Comm'n of Law Enforcement, 424 F.2d 285, 288 (5th Cir. 1970) (alleging that defendants violated Title VI and Title VI regulations)

B. District Court Decisions

Eastern Paralyzed Veterans Ass'n v. Sykes, 697 F. Supp. 854, 857 (E.D. Pa. 1988) (alleging that defendant violated 49 C.F.R. §§ 27.61-27.67, issued pursuant to § 504)

Andre H. v. Ambach, 104 F.R.D. 606, 608 (S.D.N.Y. 1985) (alleging violation of 34 C.F.R. § 104, issued pursuant to § 504 of Rehabilitation Act)

Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 126 (S.D. Ohio 1984) (stating that 23

C.F.R. § 710.405, issued pursuant to Title VI, "contemplates that discriminatory effect can be a violation, even where there is no discriminatory purpose")

Mabry v. State Bd. for Community Colleges & Occupational Educ., 597 F. Supp. 1235, 1238 (D. Colo. 1984) (alleging violation of Title IX and its regulations), *aff'd*, 813 F.2d 311 (10th Cir. 1987)

Subway Newsdealers Corp. v. Metropolitan Transp. Auth., 563 F. Supp. 319, 320 (S.D.N.Y. 1983) (alleging that defendant violated DOT regulations implementing Title VI)

Yaris v. Special Sch. Dist., 558 F. Supp. 545, 561 (E.D. Mo. 1983) (alleging violation of 34 C.F.R. § 104.33, implementing § 504)

Thomas v. Johnston, 557 F. Supp. 879, 890 (W.D. Tex. 1983) (alleging violation of § 504 of Rehabilitation Act and its implementing regulations)

O'Connor v. Board of Educ., 545 F. Supp. 376, 382 (N.D. Ill. 1982) (alleging that the defendants violated Title IX regulation, 45 C.F.R. § 86.41)

Gary B. v. Cronin, 542 F. Supp. 102, 106, 111 (N.D. Ill. 1982) (finding that plaintiffs' claims that defendants violated Rehabilitation Act and its regulations survived motion to dismiss)

Lane v. Lincoln County Hosp., 537 F. Supp. 114, 119-20 (E.D. Tenn. 1982) (alleging violation of 42 C.F.R. § 124.603, implementing § 504 of the Rehabilitation Act)

Dopico v. Goldschmidt, 518 F. Supp. 1161, 1168-69 (S.D.N.Y. 1981) (alleging violations of § 504 of Rehabilitation Act and its regulations), *aff'd in part, rev'd in part*, 687 F.2d 644 (2d Cir. 1982)

Jennings v. Alexander, 518 F. Supp. 877, 879, 885 (M.D. Tenn. 1981) (where plaintiffs allege violations of § 504 of Rehabilitation Act and its regulations, "agreeing that a disparate impact test is the appropriate standard to apply in a § 504 case"), *rev'd on other grounds*, *Alexander v. Choate*, 469 U.S. 287, 299 (1985) ("[W]e assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.")

Philipp v . Carey, 517 F. Supp. 513, 515 (N.D.N.Y. 1981) (alleging that defendants violated Rehabilitation Act implementing regulations)

Doe v. Syracuse Sch. Dist., 508 F. Supp. 333, 337 (N.D.N.Y. 1981) (finding that defendant "violate[d] both the letter and spirit" of 45 C.F.R. § 84.14, implementing § 504 of the Rehabilitation Act)

Jackson v. Conway, 476 F. Supp. 896, 903-04 (E.D. Mo. 1979) (finding that plaintiffs have failed to demonstrate probable success on the merits where they failed to show that defendants had not satisfied applicable Title VI regulation)

Rone v. Fireman, 473 F. Supp. 92, 129 (N.D. Ohio 1979) (alleging that defendant violated various § 504 implementing regulations)

Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 663, 665 (D.R.I.) (where plaintiff alleged violation of Title IX and its regulations, stating that the "dispute is resolved by interpreting and applying the regulation promulgated under Title IX" and granting plaintiff's motion for preliminary injunction), *vacated as moot*, 604 F.2d 733, 734 (1st Cir. 1979)

Rios v. Read, 73 F.R.D. 589, 595 (E.D.N.Y. 1977) (defining the defendant school district's obligations based on requirements in Title VI's regulations)

Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n v. Department of Health, Educ. & Welfare, 418 F. Supp. 585, 589 (E.D. Mich. 1976) (looking to Title VI regulation, 45 C.F.R. § 80.3, to determine whether plaintiffs had shown substantial likelihood of success on merits)

Flanagan v. President & Dir. of Georgetown College, 417 F. Supp. 377, 381 (D.D.C. 1976) (alleging that defendants' allotment of financial aid on basis of race was "in violation of specific prohibitions in the H.E.W. regulations, as well as the general prohibition in the statute")

Mendoza v. Lavine, 412 F. Supp. 1105, 1106, 1107 (S.D.N.Y. 1076) (alleging violation of Title VI and its regulations)

Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146-47 (W.D. Tex. 1972) (determining that Housing Authority's actions "are subject to judicial review" to determine compliance with Title VI discriminatory effects regulations)

North Phila. Community Bd. v. Temple Univ., 330 F. Supp. 1107, 1111 (E.D. Pa. 1971) (finding that the "actions complained of by plaintiffs are specifically prohibited by [Title VI regulations] Part 80 of Title 45, C.F.R.")

APPENDIX B

Lower Court Cases Brought Pursuant to Regulations Issued under Title VI after the Enactment of the Civil Rights Restoration Act[1]

A. Circuit Court Decisions

New York City Envtl. Justice Alliance v. Giulani, 214 F.3d 65, 67 (2d Cir. 2000) (alleging that defendant's proposed sale of community gardens would have a discriminatory effect on minorities in violation of Title VI regulation, 45 C.F.R. § 7.35)

Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107, 111 (3d Cir. 1999) (alleging that defendants violated Title VI discriminatory effects regulations)

Powell v. Ridge, 189 F.3d 387, 399 (3d Cir.) (holding implied private of action available to enforce Title VI regulations), *cert. denied*, 120 S. Ct. 579 (1999)

Indianapolis Minority Contractors Ass'n v. Wiley, 187 F.3d 743, 750 (7th Cir. 1999) (alleging violation of Title VI regulations)

Ferguson v. City of Charleston, 186 F.3d 469, 473 (4th Cir. 1999) (alleging that defendant violated discriminatory effects regulations promulgated under Title VI), *cert. granted*, 120 S. Ct. 1239 (2000)

Burton v. City of Belle Glade, 178 F.3d 1175, 1202 (11th Cir. 1999) (recognizing "an implied private right of action to enforce the regulations promulgated under Section 602 of Title VI")

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[1] The Civil Rights Restoration Act was enacted on March 22, 1988.

Goshen Road Envtl. Action Team v. United States Dep't of Agric., No. 98-2102, 1999 WL 187264, at **2 (4th Cir. Apr. 6, 1999) (alleging that defendants violated USDA discriminatory effects regulations promulgated under Title VI)

Caractor v. Town of Hempstead Dep't of Urban Renewal, No. 97-9150, 1998 WL 536385, at **2 (2d Cir. June 11, 1998) (claims "arguably" based on Title VI regulations governing Section 8 housing)

Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997) (alleging that defendant violated EPA discriminatory effects regulations promulgated under Title VI; holding "that a private right of action exists under section 602 of Title VI and its implementing regulations"), *judgment vacated as moot*, 119 S. Ct. 22 (1998)

Villanueva v. Carere, 85 F.3d 481, 484 (10th Cir. 1996) (alleging that defendant violated Title VI regulations)

City of Chicago v. Lindley, 66 F.3d 819, 827-828 (7th Cir. 1995) (alleging that defendant violated HHS's Title VI discriminatory effects regulations)

Linton v. Commissioner of Health & Env't, 65 F.3d 508, 512 (6th Cir. 1995) (alleging that defendants violated Title VI discriminatory effects regulations)

New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (alleging that defendant violated Department of Transportation's Title VI regulations)

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1400 (11th Cir. 1993) (alleging that defendant violated Department of Education's Title VI discriminatory effects regulations)

B. District Court Decisions

Ceaser v. Pataki, No. 98CIV.8532(LMM), 2000 WL 1154318, at *1, *3 (S.D.N.Y. Aug. 14, 2000) (alleging that defendants violated Title VI regulations; "a private right of action under the HEW regulations does exist")

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (stating that "[u]nder Title VI . . . . Plaintiffs may state a claim…for equitable relief pursuant to the regulations")

GI Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (citations omitted) ("Plaintiffs have brought . . . suit . . . pursuant to 34 C.F.R. §100.3, a regulation promulgated by the Department of Education to implement Title VI . . . . The language of the regulation clearly suggests that a disparate impact analysis is appropriate under this regulation, and courts have applied it in that manner.")

Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (agreeing with the district court in *Sandoval v. Hagan* that a private right of action is available to enforce a discriminatory effects regulation)

Flores v. Arizona, 48 F. Supp. 2d 937, 942 (D. Ariz. 1999) (finding that there is a private right of action under Title VI regulation, 34 C.F.R. § 100)

Harper v. Board of Regents, Illinois State Univ., 35 F. Supp. 2d 1118, 1123 (C.D. Ill. 1999) (citations omitted) (alleging that defendants violated 35 C.F.R. § 100.3(b)(2) and 45 C.F.R. § 80.3(b)(2); "'actions having an unjustifiable disparate impact on minorities [may] be redressed through agency regulations'")

Aghazadeh v. Maine Med. Ctr., No. 98-421-P-C, 1999 WL 33117182, at *1, *5-*7 (D. Me. June 8, 1999) (refusing to dismiss plaintiff's claim that defendant violated Title VI regulation, 45 C.F.R. § 80)

Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1022 (N.D. Cal. 1998) (alleging that defendants violated Title VI regulation, 34 C.F.R. § 100.3(b)(2))

African Am. Legal Defense Fund v. New York State Dep't of Educ., 8 F. Supp. 2d 330, 337 (S.D.N.Y. 1998) (alleging that defendants violated 34 C.F.R. § 100.3(b)(2); "[u]nder Guardians Ass'n . . . agency regulations promulgated under Title VI may provide for a basis of recovery under a disparate impact theory")

Bryant v. New Jersey Dep't of Transp., 1 F. Supp. 2d 426, 429 (D.N.J. 1998) (alleging that defendant violated Department of Transportation Title VI discriminatory effects regulation)

Neal v. Board of Trustees, No. CV-F-97-5009RECSMS, 1997 WL 1524813, at *15 (E.D. Cal. Dec. 26, 1997) (granting leave to amend complaint to allege violations of Title VI discriminatory effects regulations)

Young v. Montgomery County Bd. of Educ., 922 F. Supp. 544, 549 (M.D. Ala. 1996) (alleging that defendant violated 34 C.F.R. § 100.3(b)(2); "[e]ven though Title VI itself bars only intentional discrimination, the regulations promulgated pursuant to Title VI proscribe some actions that merely have a disparate impact on groups protected by the statute")

Meyers v. Board of Educ., 905 F. Supp. 1544, 1573 (D. Utah 1995) (alleging that defendant violated Title VI regulations, 34 C.F.R. §§ 100.1 – 100.13)

Hodges v. Public Bldg. Comm'n, 864 F. Supp. 1493, 1504 (N.D. Ill. 1994) (alleging that defendant violated Title VI regulations)

City of Chicago v. Lindley, No. 92 C 4666, 1994 WL 517700, at *13 (N.D. Ill. Sept. 9, 1994) ("While [42 U.S.C. 2000d] provides only for claims based on discriminatory intent, disparate impact claims may be brought under the statute's implementing regulations at 45 C.F.R. § 80.3.")

Grimes v. Sobol, 832 F. Supp. 704, 709 (S.D.N.Y. 1993) (granting plaintiff leave to plead a claim that defendant violated Title VI regulation, 34 C.F.R. § 103(b)(2)), *aff'd*, 37 F.3d 857 (2d Cir. 1994)

Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (M.D. Ala. 1991) (citation omitted) ("[W]here a lawsuit is predicated on the federal regulations promulgated under Title VI redress is available for facially neutral 'actions having an unjustifiable disparate impact on minorities.'")

Dartmouth Review v. Dartmouth College, 709 F. Supp. 32, 39 n.10 (D.N.H.) ("A cause of action under Title VI may also be proven by showing disparate impact if the basis of the claim is a breach of the regulations promulgated thereunder."), *aff'd*, 889 F.2d 13 (1st Cir. 1989)

Meek v. Martinez, 724 F. Supp. 888, 900, 905 (S.D. Fla. 1989) (seeking relief for violations of Title VI regulation, 45 C.F.R. § 80)